

## The "Initiation" Requirement of the Fairness Doctrine: *Representative Patsy Mink*

In *Representative Patsy Mink*<sup>1</sup> the Federal Communications Commission used the "initiation" requirement of the fairness doctrine to require radio station WHAR of Clarksburg, West Virginia, to provide news coverage of the ecological, economic, and social ramifications of strip mining. *Mink* marks the first time the initiation requirement has been used to require a broadcaster to initiate coverage of a particular issue. Part of the decision's significance is that it exposes and embodies those contradictions inherent in a scheme that is simultaneously designed to give broadcasters "wide discretion" while vesting absolute "public interest" discretion in the government in the form of the fairness doctrine. More importantly, *Mink* is the clearest statement to date that broadcasters do not have the same first amendment protection as newspaper editors.

This Case Comment will review the constitutional, statutory, and administrative-law background to *Mink*. It will then analyze the decision in light of that background and explore its ramifications for current broadcast licensees. Finally, an analysis of the first amendment justifications offered for broadcast content regulation will suggest why those justifications are insufficient to legitimize the Commission's selection of particular programming matter in *Mink*.

### I. BACKGROUND

#### A. *First Amendment*

The first amendment approach taken by the Supreme Court of the United States to news presentation in the broadcasting media is vastly different from its approach to news presentation in the print media. News content selection is left entirely to the private editor's discretion in the print media, while the broadcaster's programming choice is subject to federal regulation to ensure sufficient coverage of important issues.

The Supreme Court's attitude toward the print media is characterized in *Miami Herald Publishing Co. v. Tornillo*,<sup>2</sup> a case in which the Court declared unconstitutional a Florida statute mandating a right to reply to newspaper attacks on candidates for public office. "The choice of material to go into a newspaper, . . . and [the] treatment of public issues and public officials . . . constitute the exercise of editorial control and judgment. It has yet to be demonstrated how

---

1. 59 F.C.C.2d 987, 37 RAD. REG. (P & F) 2d 744 (1976).

2. 418 U.S. 241 (1974).

governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press . . . ."<sup>3</sup> The Court concluded that "[t]he Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors."<sup>4</sup> In *CBS v. Democratic National Committee* the Court stated that a newspaper's power to advance its own political, social, and economic views is bounded only by readers' and advertisers' acceptance, and the "journalistic integrity of its editors and publishers."<sup>5</sup>

*Red Lion Broadcasting Co. v. FCC*<sup>6</sup> reveals the contrasting first amendment approach to the broadcast media, and incorporates the "scarcity rationale" that is the foundation of that approach. The central premise of the scarcity rationale is that, "Unlike other modes of expression, radio is inherently not available to all. That is its unique characteristic, and that is why unlike other modes of expression it is subject to governmental regulation."<sup>7</sup> The Court in *Red Lion* elaborated on that theme by stating that "the lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time."<sup>8</sup>

Additionally, *Red Lion* offered the "listeners' rights" theory, an apparent offshoot of the scarcity rationale, as further justification for governmental regulation of the broadcast medium: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."<sup>9</sup> Finally, it embellished that theory by noting: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."<sup>10</sup>

## B. *Radio Communications Acts*

The statutory framework for implementing the concepts recognized in *Red Lion* began to develop early in the history of radio. Because of America's historic aversion to censorship, Congress opted not for

---

3. *Id.* at 258. Justice White asserted the principle even more vehemently in his concurrence: "[P]rior compulsion by government in . . . the decision as to what copy will or will not be included in any given edition—collides with the First Amendment." *Id.* at 261.

4. *Id.* at 258. For a perfect analogue to the Florida statute in the communications field, see 47 C.F.R. §§ 73.123, 73.300, 73.598, and 73.679 (1976).

5. 412 U.S. 94, 117 (1973).

6. 395 U.S. 367 (1969).

7. This reasoning was set forth in *NBC v. United States*, 319 U.S. 190, 226 (1943), the first case to explicitly sanction federal regulation of the broadcast media. See *Red Lion*, 395 U.S. at 388, citing *NBC* in support of its own reasoning.

8. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969). While the fundamental constitutional, statutory, and administrative-law issues are the same in the field of television as in the field of radio, the scope of this Case Comment will be limited to radio broadcasting.

9. *Id.* at 390.

10. *Id.* (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

governmental ownership and control of the broadcasting media, but for a system of private broadcasters licensed and regulated by government.<sup>11</sup> In response to the "chaos which ensued from permitting anyone to use any frequency at whatever power level he wished"<sup>12</sup> under a 1912 law,<sup>13</sup> Congress in 1927 established the Federal Radio Commission to allocate frequencies in a manner responsive to the "public convenience, interest, or necessity."<sup>14</sup>

When the Radio Act of 1927 was superseded by the Communications Act of 1934, the licensees' obligation to operate "in the public interest" was explicitly carried forward.<sup>15</sup> The 1934 Act, which created the Federal Communications Commission<sup>16</sup> to replace the Federal Radio Commission, "does not restrict the Commission merely to the supervision of traffic. It puts upon the Commission the burden of determining the composition of that traffic."<sup>17</sup>

Simultaneously, however, the 1934 Act explicitly precluded governmental censorship of broadcast licensees.<sup>18</sup> The Supreme Court in *Red Lion* recognized that provision's constitutional basis by stating that the first amendment "has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference 'with the right of free speech by means of radio communication.'"<sup>19</sup>

The Federal Communications Commission, then, must guard the public interest in news program content by balancing the licensee's first amendment rights as a "free agent" with the first amendment rights of the public.<sup>20</sup> In its broad function of overseeing broadcast-

11. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 116 (1973).

12. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969).

13. Radio Act of 1912, ch. 287, 37 Stat. 302.

14. Radio Act of 1927, ch. 169, § 4, 44 Stat. 1163 (superseded by 47 U.S.C. § 151 (1970)).

15. *See, e.g.*, ch. 652, § 307, 48 Stat. 1083 (codified at 47 U.S.C. § 307 (1970)).

16. Ch. 652, § 1, 48 Stat. 1064 (codified at 47 U.S.C. § 151 (1970)).

17. *NBC v. United States*, 319 U.S. 190, 215-16 (1943).

On one occasion, Congress acted directly on broadcast content by passing the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 89 (codified at 15 U.S.C. § 1331-1338, 1335 (1970)). The Act banned all advertising of cigarettes after January 1, 1971, on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission. The ban was upheld against first amendment challenge in *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), *aff'd sub nom.* *Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972).

18. Ch. 652, § 326, 48 Stat. 1091 (codified at 47 U.S.C. § 326 (1970)):

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

19. 395 U.S. 367, 389 (1969).

20. The Supreme Court has recognized that both freedom of speech and freedom of the press apply to radio newscasts. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 32 n.3 (1971). Previously, *Red Lion* had characterized the broadcaster's rights as an undifferentiated freedom of speech, while *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948) had characterized their protection as freedom of the press. Justice Stewart has recently suggested that the press clause affords broadcasters more protection from governmental intrusion than the speech clause. Stewart, "*Or of the Press*," 26 HASTINGS L.J. 631 (1975). *See also* Nimmer,

ing, the Commission must thus balance its own constitutional and statutory power to dispense licenses and determine the composition of broadcast traffic with the conflicting constitutional and statutory preclusion of censorship.<sup>21</sup>

### C. Fairness Doctrine

#### 1. Development

The primary administrative balancing tool used by the Commission is the fairness doctrine, the development of which roughly paralleled the statutory development of broadcast regulation. The Federal Radio Commission spawned the rudiments of the doctrine as an embodiment of the 1927 Act's public interest standard: "[T]he public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies . . . to all discussion of issues of importance to the public."<sup>22</sup>

The first fully developed version of the fairness doctrine was set forth in the Federal Communications Commission's *Report on Editorializing By Broadcast Licensees*<sup>23</sup> [hereinafter referred to as *1949 Report*]: "The Commission has . . . recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station."<sup>24</sup> While the *1949 Report* continues to be the basic source of all subsequent fairness doctrine policy,<sup>25</sup> the doctrine's clearest statement is contained in *The Handling of Public Issues Under the Fairness Doctrine and The Public Interest Standards of the Communications Act*<sup>26</sup> [hereinafter referred to as *Fairness Report*]. There the Commission said that,

stripped to its barest essentials, the fairness doctrine involves a two-fold duty: 1) the broadcaster must devote a reasonable percentage of his broadcast to the coverage of public issues; and 2) his coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view."<sup>27</sup>

---

*Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975).

21. "To perform its statutory duties, the Commission must oversee without censoring. This suggests something of the difficulty and delicacy of administering the Communications Act." *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 118 (1973).

22. *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32, 33 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930). It should be noted here that the Commission exercises a broad form of overall subject-matter regulation through the licensing grant and renewal process. See *Primer on Ascertainment of Community Problems By Broadcast Applicants*, 27 F.C.C.2d 650, 21 RAD. REG. (P & F) 2d 1507 (1971).

23. 13 F.C.C. 1246 (1949).

24. *Id.* at 1249.

25. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 384 (1969).

26. 48 F.C.C.2d 1, 30 RAD. REG. (P & F) 2d 1261 (1974).

27. *Id.* at 7, 30 RAD. REG. (P & F) 2d at 1273.

That is, the broadcaster has a duty to initiate some coverage of public issues, and after initiation he has a duty to give full play to contrasting views on those issues. The test of what issues impose the broadcaster's duty is formulated as "controversial issues of public importance."<sup>28</sup>

## 2. *Implementation of the Initiation Requirement*

Complaints brought before the FCC have almost exclusively involved the scope of the broadcaster's duty under the "full-play" requirement of the fairness doctrine. For that reason, and perhaps because the FCC has sought to avoid the censor's image which attaches to the regulation of program content, there has been virtually no Commission action regarding the selection of "controversial issues of public importance" under the initiation requirement of the doctrine.<sup>29</sup> Thus, the scope of the broadcaster's duty to initiate coverage has, until *Mink*, involved only a nonspecific duty to cover some important news issues.

Nonetheless, the question of proper implementation of the initiation requirement has not been ignored. The Commission has issued statements that reflect the divergence between the Commission's constitutional and statutory duties to, on the one hand, protect the public interest in the use of broadcasting frequencies and, on the other hand, to avoid censorship.

On the "composition of traffic" and "listeners' rights" side of the ledger, a Commission ruling sent to Gary Soucie, who had attacked the "one-sidedness" of automobile commercials, stated that: "It would [not be] reasonable for broadcasting to ignore . . . burning issues of the seventies."<sup>30</sup> The *Soucie* passage was developed in the *Fairness Report*. There the Commission stated: "We have, in the past, indicated that some issues are so critical or of such public importance that it would be unreasonable for a licensee to ignore them com-

---

28. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380 (1969); Memorandum Opinion and Order on Reconsideration of the Fairness Report, 58 F.C.C.2d 691, 693, 36 RAD. REG. (P & F) 2d 1021, 1026 (1976); The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, 11, 30 RAD. REG. (P & F) 2d 1261, 1278 (1974); 1949 Report, *supra* note 23, at 1251. It is arguable that in enforcement of the first half of the doctrine, even noncontroversial issues of public importance ought to be presented, e.g., the importance of voting. The distinction between controversial and noncontroversial public issues appears to have evolved through usage in applying the doctrine's second half, rather than having been formally drawn. See generally 1949 Report, *supra* note 23, at 1251. For a discussion of the factors to be considered in determining whether an issue is a "controversial issue of public importance" for purposes of applying the second half of the doctrine, see *Fairness Report*, 48 F.C.C.2d at 11-12, 30 RAD. REG. (P & F) 2d at 1278-79. Hereinafter, the first half of the fairness doctrine will be referred to as the "initiation" requirement, and the second half will be referred to as the "full play" requirement.

29. For a discussion of the FCC's fear of the censor's image as a factor in the paucity of initiation enforcement, see Comment, *Enforcing the Obligation to Present Controversial Issues: the Forgotten Half of the Fairness Doctrine*, 10 HARV. C.R.-C.L. L. REV. 137, 151 (1975).

30. Mr. Gary Soucie, 24 F.C.C.2d 743, 750, 19 RAD. REG. (P & F) 2d 994, 1002 (1970).

pletely."<sup>31</sup> These two statements suggest that the fairness doctrine's requirement that the licensee "devote a reasonable percentage of his broadcast time to the coverage of public issues" may be implemented by requiring the licensee to cover some particular issues selected from the entire range of issues available. This conclusion might also be inferred from the language of the initiation requirement. Giving "reasonable" coverage to public issues can only mean covering some assortment of particular public issues. Since "a station's primary obligation is to its city of license,"<sup>32</sup> enforcing that general requirement could be read to mandate coverage of certain local problems. Finally, it is only a short step from forcing a licensee to give more coverage of an issue than it has chosen to give under the full-play requirement of the fairness doctrine to forcing the licensee to cover an issue that it has chosen not to cover under the initiation requirement of the doctrine.<sup>33</sup>

On the anticensorship side of the fairness ledger,<sup>34</sup> the 1949 *Report* imposed only a vague good faith duty of initiation on the broadcaster: "The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered . . . ."<sup>35</sup> A principle from the Commission's *Fairness Doctrine Primer* limits that duty: "In passing on any complaint in this area, the Commission's role is *not to substitute its judgment* for that of the licensee as to any of the above programming decisions . . . ."<sup>36</sup> Finally, the *Fairness Report*, after suggesting that some issues are so critical that they must be covered, asserted that "we have no intention of becoming involved in the selection of issues to be discussed, nor do we expect a broadcaster to cover each and every important issue which may arise in his community."<sup>37</sup>

## II. THE *Mink* DECISION

On July 8, 1974, United States Representative Patsy Mink of Hawaii, a sponsor of anti-strip-mining legislation then before Congress,

31. 48 F.C.C.2d 1, 10, 30 RAD. REG. (P & F) 2d 1261, 1276 (1974).

32. *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650, 654, 21 RAD. REG. (P & F) 2d 1507, 1512 (1971).

33. In 1962 the Commission abandoned its procedure of only undertaking fairness reviews as a part of the license renewal process. For a discussion of that decision, see *NBC v. FCC*, 516 F.2d 1101, 1115-16 (D.C. Cir. 1974). One rationale for the abandonment was that the delay until renewal time was unfair to the listening public. Thus, after 1962, inadequate coverage could be immediately corrected under a Commission suggestion that opposing viewpoints deserved more attention than they had already received.

34. See text accompanying note 19 *supra*.

35. 13 F.C.C. 1246, 1251 (1949).

36. *Fairness Doctrine Primer*, 40 F.C.C. 598, 599, 2 RAD. REG. (P & F) 2d 1901, 1904 (1964) (emphasis added). The context of the quotation suggests it is directed to the full-play fairness requirement. It would apply a fortiori to the initiation requirement, particularly since the Commission has been more cautious in enforcing it than in enforcing the full-play requirement.

37. 48 F.C.C.2d 1, 10, 30 RAD. REG. (P & F) 2d 1261, 1277 (1974).

wrote to radio station WHAR in Clarksburg, West Virginia, and several other stations, requesting that they broadcast an eleven-minute tape. The tape contained a proposal that she claimed would contrast viewpoints presented in a pro-strip-mining United States Chamber of Commerce program allegedly aired by WHAR. Thus, Representative Mink was attempting to capitalize on the broadcasters' full-play duty. Two days later WHAR returned the tape, stating that it had presented no coverage on the strip-mining issue—which meant that no full-play duty existed.

Following another exchange of letters in late July, the Media Access Project on September 25, 1974, filed a fairness complaint with the Federal Communications Commission on behalf of Mink, the Environmental Policy Center, and O. D. Hagedorn, a Clarksburg citizen.<sup>38</sup> The complaint alleged that the licensee failed to air *any* programming on the strip-mining controversy in a four month period (the spring and summer of 1974) during which Congress was debating mining legislation. The complaint further alleged that the issue was and continued to be "of extraordinary controversiality and public importance to WHAR's listeners."<sup>39</sup> In support of their allegations the complainants cited a substantial volume of material, most notably nine front-page stories in an eleven-day span from the *Clarksburg Telegram* and coverage of the issue in other area newspapers. They also submitted evidence that the issue had received coverage in national periodicals and enclosed a 1971 report compiled by the Appalachian Research & Development Fund, Inc., of Charleston, West Virginia, stating that the report put all area broadcasters on notice of the importance of the strip-mining issue. The complaint finally requested the FCC to direct WHAR to immediately schedule substantial strip-mining programming.<sup>40</sup>

Three months later, on December 11, 1974, the Commission sent WHAR a letter of inquiry requesting comment on the complaint. In its reply of January 13, 1975, WHAR stated that when it told Mink that it had presented no coverage on the strip-mining controversy, it meant only that no locally oriented programming had been offered. It stated that it had broadcast whatever strip-mining programming had been afforded by the ABC network and Associated Press news services as a part of its regular programming.

WHAR's reply also argued that even if it had failed to cover the strip-mining controversy, it would not be answerable to the Commission because there was no established precedent or rule requiring any particular licensee to cover any particular issue. The station further

---

38. *Id.* at 987, 37 RAD. REG. (P & F) 2d at 745.

39. *Id.* at 988, 37 Rad. REG. (P & F) 2d at 745. See generally text accompanying note 28 *supra*.

40. *Id.* at 988-89, 37 RAD. REG. (P & F) 2d at 745-46.

stated that any governmental attempt to determine what issues shall be treated "enfleshes the specter of censorship."<sup>41</sup>

On February 4, 1975, WHAR submitted Associated Press tear-sheet items broadcast during June 1974 in an attempt to substantiate its claims that it had presented numerous strip-mining news items. In early April, the complainants sent the FCC further material regarding the importance and controversiality of the strip-mining issue. The sending of correspondence to the Commission ended on June 18, 1975.<sup>42</sup>

The Commission found that the complainants' extensive supporting material established that the strip-mining controversy was "a critical controversial issue of public importance in Clarksburg."<sup>43</sup> It further found that WHAR failed to prove that it had covered the issue.<sup>44</sup> The FCC held "that WHAR has acted unreasonably in failing to cover the issue of strip mining," and was therefore in violation of the initiation requirement of the fairness doctrine. The Commission stated further that "where . . . an issue has significant and possibly unique impact on the licensee's service area . . . it must be shown that there has been some attempt to inform the public of the nature of the controversy, not only that such a controversy exists." WHAR was given twenty days to inform the Commission on how it intended "to meet its fairness obligations with respect to adequate coverage of the aforementioned issue."<sup>45</sup>

### III. ANALYSIS: USE OF AUTHORITY, RAMIFICATIONS AND JUSTIFICATIONS

#### A. *Use of Authority*

Because of the implicit contradiction between the proposition that "some issues are so critical they must be covered," on the one hand, and the proposition that "we have no intention of selecting the issues to be discussed" on the other, the Commission in *Mink* could find support for either requiring or not requiring WHAR to cover the strip-mining issue. But the Commission reached the former result with too shallow an analysis for this delicate first amendment area. It failed to acknowledge that the supporting language it used was only dicta from previous decisions and that some passages did not address the question for which they were cited for support. Moreover, it ig-

---

41. *Id.* at 989-90, 37 RAD. REG. (P & F) 2d at 747.

42. *Id.* at 993, 37 RAD. REG. (P & F) 2d at 751.

43. *Id.* at 995, 37 RAD. REG. (P & F) 2d at 754.

44. *Id.* at 996-97, 37 RAD. REG. (P & F) 2d at 754-56.

45. *Id.* at 997, 37 RAD. REG. (P & F) 2d at 756. A September 21, 1976, telephone interview with Mr. James Fawcett, President of WHAR, revealed that the station, rather than appeal the FCC's ruling, offered ten half-hour time slots for the public to call in to discuss strip mining. Mr. Fawcett reported having received only two calls during the ten periods.



nored the "no selection of issues" line of thought, largely by not mentioning it and partly by the simple assertion that it was not selecting programming for WHAR.

For example, the Commission cited *CBS v. Democratic National Committee* for the proposition that "the fairness doctrine 'imposes two affirmative obligations on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints.'"<sup>46</sup> From this one can infer either that the *licensee* may choose the particular issues it will cover—and that the nonspecific nature of the initiation requirement was merely clumsily stated—or that "adequate coverage" of public issues imposes a duty on the broadcaster to cover some specific issues. The Commission opted for the latter inference from the *CBS* passage, stating: "If the fairness doctrine is to have any meaningful impact, broadcasters must cover, at the very least, those topics which are of vital concern to their listeners."<sup>47</sup> However, the Court's pronouncement in *CBS* is only another version of the fairness statement in the *1949 Report*, which makes clear the nonspecific nature of the initiation requirement. Restating the generality only presents and does not answer the question of whether it should be particularized with a necessarily vague "vital concern" standard. Moreover, the *CBS* decision involved only the full-play requirement of the fairness doctrine. Thus, even if the statement could properly be read to require coverage of particular issues, it is only dicta and should have been recognized as such.

The Commission asserted that action of the type taken in *Mink* was contemplated by the Court in *Red Lion*, citing the Court's declaration that, "If the present licensees should suddenly prove timorous, the commission is not powerless to insist that they give adequate and fair attention to public issues."<sup>48</sup> The *Red Lion* statement, like that from *CBS*, does not answer the crucial question—must the licensee cover any particular issue? *Red Lion*'s own clarification of the statement says that licensees are not permitted to "exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect."<sup>49</sup> This statement perhaps weakens the Commission's reading of *Red Lion*, for neither the statute,<sup>50</sup> long-standing administrative practice,

---

46. *Id.* at 993, 37 RAD. REG. (P & F) 2d at 752 (quoting *CBS v. Democratic Nat'l Comm.* 412 U.S. 94, 111 (1973)).

47. *Id.*, 37 RAD. REG. (P & F) 2d at 752.

48. *Id.* at 994, 37 RAD. REG. (P & F) 2d at 752-53 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 393 (1973)).

49. 395 U.S. 367, 394 (1969).

50. 47 U.S.C. § 315 (1970) deals with air time for candidates for public office. The portion pertinent to fairness law reads:

Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and

nor previous cases had required a particular licensee to cover a particular issue. Finally, the *Red Lion* material cited in *Mink* is, like the *CBS* statement, dicta—the decision involved the full-play requirement, not the initiation requirement of the fairness doctrine.<sup>51</sup>

Shortly after its reference to *Red Lion*, the Commission stated that “[t]he question of whether a licensee has presented significant coverage of vital issues of public importance, which has been found to be necessary to fully inform the public, has been the subject of previous Commission action.”<sup>52</sup> The first case cited for that proposition, *Committee For The Fair Broadcasting of Controversial Issues*,<sup>53</sup> involved several related full-play fairness complaints requesting time to reply to previous Vietnam war coverage, and did not incorporate any discussion of the initiation requirement. The second case, *WSNT, Inc.*,<sup>54</sup> also distinctly limited its fairness doctrine discussion to the application of the full-play requirement to an issue that had been previously covered.

In *Mr. Gary Soucie*<sup>55</sup> the Commission stated that “it would be no more reasonable for broadcasting to ignore . . . burning issues of the seventies—which may determine the quality of life for decades or centuries to come—than it would be to ignore the issue of . . . racial unrest in communities racked by this problem.”<sup>56</sup> In a manner suggesting heavy reliance on *Soucie*, the Commission concluded in *Mink* that “WHAR has acted unreasonably in failing to cover the issue of strip mining, an issue which clearly may determine the quality of life in Clarksburg for decades to come.”<sup>57</sup> Interestingly, the Commission in *Mink* failed to reveal that *Soucie* had involved only a full-play fairness requirement, the complainants having pressed for the right to present “the other side” of automobile and gasoline commercials. Moreover, the Commission said in *Soucie*: “We wish to emphasize that our ruling is restricted to the general product advertisement.”<sup>58</sup>

---

on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

51. At issue was an application of the Commission's personal-attack regulations, which are cited in note 4 *supra*.

52. 59 F.C.C.2d at 994, 37 RAD. REG. (P & F) 2d at 753.

53. 25 F.C.C.2d 283, 19 RAD. REG. (P & F) 2d 1103 (1970).

54. 27 F.C.C.2d 993, 21 RAD. REG. (P & F) 2d 405 (1971).

55. 24 F.C.C.2d 743, 19 RAD. REG. (P & F) 2d 994 (1970).

56. *Id.* at 750-51, 19 RAD. REG. (P & F) 2d at 1002 (1970) (emphasis added).

57. 59 F.C.C. at 997, 27 RAD. REG. (P & F) 2d at 756 (emphasis added). The inference of reliance arising from language similarity is corroborated by the fact that the *Fairness Report*, cited as authority for the proposition that some issues are so critical that they must be covered (see 59 F.C.C.2d at 994, 37 RAD. REG. (P & F) 2d at 753), explicitly cites *Soucie* as the source of that idea. *Fairness Report*, 48 F.C.C.2d 1, 10, 30 RAD. REG. (P & F) 2d 1261, 1276 (1974). See text accompanying note 31 *supra*.

58. 24 F.C.C.2d 743, 19 RAD. REG. (P & F) 2d 994, 1001 (1970).

The most disturbing aspect of *Mink* is its handling of previous authority that is contrary to the result reached. The Commission in *Mink* failed to mention the *Fairness Doctrine Primer's* statement that "the Commission's role is not to substitute its judgment for that of the licensee."<sup>59</sup> Conscious recognition of the *Primer's* idea would have logically precluded the Commission's particular implementation of its judgment that WHAR had acted unreasonably, as would have reference to the *Fairness Report's* statement that "we have no intention of becoming involved in the selection of issues to be discussed."<sup>60</sup>

Early in the *Mink* decision the Commission at least verbally recognized the underlying theme of those two statements: "The Commission . . . has no intention of intruding on licensee's day-to-day editorial decision-making."<sup>61</sup> The Commission correctly explained this statement by equating involvement in daily decision-making with the censorship that is precluded by 47 U.S.C. § 326.<sup>62</sup> Later, however, the Commission made a self-contradictory statement:

While it would be an exceptional situation and would *not* counter our intention to stay out of decisions concerning the selection of specific programming matter, we believe that the unreasonable exercise of the licensee discretion, *i.e.*, failure to adequately cover a "critical issue" in a particular community, would require appropriate remedial action on the part of the Commission.<sup>63</sup>

True, the "appropriate remedial action" taken in *Mink* was exceptional. But it would be sophistic to say that it did not involve the selection of specific programming matter. Although the Commission is not deciding precisely what will be said, there is no principled distinction between doing that and choosing the topics to be covered in light of the requirement that full play be given to opposing viewpoints.

By reaching its result in *Mink*, the Commission would apparently have us believe that a little content selection, *i.e.*, censorship, is really none at all. However, any issue a licensee is forced to cover will have to be covered on some particular day. The Commission will have intruded on the licensee's decisionmaking at least on that day and to that extent. The number of days on which the intrusion occurs can only alter the degree, not the fact, of censorship.

59. 40 F.C.C. 598, 599, 2 RAD. REG. (P & F) 2d 1901, 1904 (1964).

60. 48 F.C.C.2d 1, 10, 30 RAD REG. (P & F) 2d 1261, 1277 (1974).

61. 59 F.C.C.2d at 994, 37 RAD. REG. (P & F) 2d at 752.

62. *Id.* (citing 47 U.S.C. § 326 (1970)). For the text of the statute see note 18 *supra*. While censorship technically means the deletion of undesired material, it was judicially defined as "the denial of the right of freedom of the press and the right of freedom of speech" in *Esquire v. Walker*, 55 F. Supp. 1015, 1020 (1944). This paper uses the term "censorship" in the *Esquire* sense to include governmentally forced inclusion of subject matter as well as its deletion.

63. 59 F.C.C.2d at 994, 37 RAD. REG. (P & F) 2d at 752 (emphasis added).

## B. Immediate Ramifications

A major problem arising from *Mink* is to determine under what circumstances the initiation requirement's new particularization will or will not be applied.<sup>64</sup> Unfortunately, the Commission saw no need to furnish any guidelines for current and future licensees trying to anticipate which issues are so critical that a failure to cover them will violate the fairness doctrine.<sup>65</sup> Its statement that the "issue has significant and possibly unique impact on the licensee's service area" is little help.

The probable chilling effect of so amorphous a standard is evident. Licensees will primarily want to avoid the expense of legal action and ongoing correspondence with the FCC. Unless and until *Mink* is retracted or overruled, the existence of pollution, race, labor, or school problems—to name only a few examples—in any particular community will leave the local licensee with little choice about how to fill its valuable news time. And once the anticipation of an FCC reprimand forces a licensee to cover an issue it would rather have left alone, the full-play requirement of the fairness doctrine will demand still more of its time for opposing viewpoints.

Even assuming greater licensee caution, another immediate ramification of *Mink* is the probable increase in the volume of pleas for FCC intervention upon radio licensees' failures to cover any alleged locally salient issue. Would-be speakers will be less hesitant to sue now that the barrier to actual issue selection has been crossed by the FCC. Thus, *Mink* will make it increasingly difficult to turn away well-documented invitations to participate in programming decisions concerning "critical" issues. And any plausible complaint will engender FCC involvement in the licensee's daily programming, at least in the form of extensive—and expensive—requests for information concerning what has or has not been covered.<sup>66</sup>

---

64. Since *Mink* will not be appealed, see note 45 *supra*, current licensees will have to operate with an awareness of it unless it is later overruled by the Commission itself or by the courts. Judicial review of Commission orders and decisions is governed by 47 U.S.C. § 402 (1970), which provides for appeal only to the United States Court of Appeals for the District of Columbia.

65. Public Communications, Inc. 50 F.C.C.2d 395, 400, 32 RAD. REG. (P & F) 2d 319, 324 (1974), mentioned briefly in *Mink*, suggests that the factors discussed in the *Fairness Report*, note 26 *supra*, may be used as guidelines for determining the "must-cover" issues. However, *Public Communications* emphasizes that "there are not, and in fact cannot be, any quantitative standards against which one could measure the applicability of any or all of these three factors to any particular issue." The curious point is that identification of the factors named in the *Fairness Report*, or at least an allusion to them in the decision, would seem to be particularly warranted in light of the result in *Mink*.

66. For the specificity of information required from, and procedure to be followed by anyone bringing, a complaint before the Commission, see Memorandum Opinion and Order on Reconsideration of the *Fairness Report*, 58 F.C.C.2d 691, 36 RAD. REG. (P & F) 2d 1021 (1976).

A suggestion reviewed in *NBC v. FCC*, 516 F.2d 1101, 1116 (D.C. Cir. 1974), surveys the burdens a fairness hearing imposes on the licensee. The primary burdens are legal and other

### C. *Justifications Offered for Broadcast Regulation*

The validity of *Mink* ultimately rests on first amendment theory. More specifically, it rests on the justifications offered in the broadcasting field for deviation from the hands-off approach to selection of news program content by newspaper editors.

#### 1. *The Scarcity Rationale*

The scarcity rationale, that radio is a unique mode of communication because it is "inherently not available to all," continues to be the underlying premise of broadcast regulation. But radio frequencies are the fruit of application of human knowledge to natural resources<sup>67</sup>—the electromagnetic spectrum and the materials used in transmitting and receiving facilities—as newspapers are the fruit of application of human knowledge to the exhaustible resources used in making such facilities as printing presses.<sup>68</sup> While the degree of technological difficulty in developing radio frequencies may exceed the degree of difficulty in developing a newspaper, it would indeed be difficult to imagine any commodities that are "inherently available to all."

#### 2. *Limited Technology Rationale*

The Supreme Court in *Red Lion*, in explaining the origin and continued existence of broadcast regulation, offers a theoretically more plausible "technological limits" rationale: "Only a tiny fraction . . . can hope to communicate by radio at the same time . . . even if the entire radio spectrum is utilized in the present state of commercially acceptable technology."<sup>69</sup> That passage suggests that broadcast regulation was originally, and in part still is, based on the circumstance that only a limited number of facilities could be operated simultaneously at a given level of technological achievement.

When saturation was first becoming apparent, governmental action was needed to define and delimit the private property rights that were in the process of being created by the application of human

---

monetary expenses, and the time that top-level station personnel must divert from regular operations during the lengthy process from complaint to resolution. In *Mink*, the process ran from September 1974 through June 1976.

67. Cf. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967) ("Airwaves," i.e., the total spectrum of useful frequencies, is shorthand for a phenomenon created by use of privately owned transmission facilities.) See note 70 *infra* and accompanying text.

68. Cf. Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 GEO. WASH. L. REV. 719, 761 (1963) (All mass media are similarly limited, and limitations are essentially economic); Note, *Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulation*, 28 STAN. L. REV. 563, 575 (1976) (there is no strict physical limitation on expanding spectrum utilization; similar economic limitations affect both print and broadcast media).

69. 395 U.S. 367, 388 (1969).

knowledge to a resource.<sup>70</sup> The Federal Communications Commission, however, was not established merely to define rights in order to preclude electronic interference; it was also given "the burden of determining the composition" of radio traffic.<sup>71</sup> The apparent assumptions underlying that decision, and continuing today, are that those latecomers who want to use the airwaves either can not or should not be required to develop new technology in order to expand the airwaves' usefulness. The assumption that they can not has been proven wrong by developments in the field.<sup>72</sup>

As to the belief that latecomers should not be required to develop new technology, it is true that the early need for new technology to further exploit the available resource sets radio apart from the print media. But it is ironic that those in the forefront of radio's development are to be penalized in favor of those who may either enter the field later or never enter it at all. If the disparity among men's creative abilities justifies the limits placed on property rights in the broadcasting field, there is no reason it should not have the same effect in other fields as well, including the print media.<sup>73</sup>

---

70. This proposition is set forth in Rand, *The Property Status of Airwaves*, in CAPITALISM: THE UNKNOWN IDEAL 122 (A. Rand ed. 1967). Rand begins her essay by reviewing the source of property rights:

Any material element or resource which, in order to become of use or value to men, requires the application of human knowledge or effort, should be private property —by the right of those who apply the knowledge and effort. This is particularly true of broadcasting frequencies . . . because they are produced by human action and do not exist without it.

She further suggests that what should have taken place is the electromagnetic equivalent of the Homestead Act of 1862. The government would have been the custodian, rather than the owner, of the undeveloped resource (the electromagnetic spectrum). It would have then impartially allocated the frequencies (*i.e.*, the fruit of the application of human effort to the resource) on a first-come, first-served basis, and any hopeful developer of a frequency would have become its owner only after operation of it for a certain number of years. The government would then have the continuing function of protecting the rights of each user from electromagnetic interference by others.

For a thorough interdisciplinary plan for turning the electromagnetic spectrum over to private ownership, see De Vany, Eckert, Meyers, O'Hara, & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499 (1963). Part of their proposal for the transition from the current system includes setting an expiration date for current licenses and auctioning off portions of the spectrum to the highest bidders.

71. *NBC v. United States*, 319 U.S. 190, 216-17 (1943).

72. For the Court's own acknowledgement of that fact, see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 397, 399 (1970).

73. Creative disparity would be entirely irrelevant unless the number wanting frequencies was larger than the number of existing frequencies—again, the problem is reduced to one of economic scarcity. But that is only the starting point for the question of how the scarce commodity should be rationed. See generally Pierson, *The Need for Modification of Section 326*, 18 FED. COMM. B.J. 15 (1963); Note, *Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulation*, 28 STAN. L. REV. 563 (1976). See generally text accompanying note 79 *infra*. It is important to recognize in the context of a speaker desiring access to a broadcaster's facilities, that the broadcaster's denial of the use of his facilities to the would-be speaker no more denies the latter's freedom of speech than a man's denial of the use of his automobile to another denies the latter's right to the use of transportation. The seeker is free to speak or ride on the strength of, and to the extent of his own abilities, as is the producer. Broadcasting regulation conveniently ignores that the desired substances (facilities) are not

### 3. *Listeners' Rights Theory*

The listeners' rights theory—that the rights of the listeners take precedence over the rights of the broadcaster—is purportedly based in *Red Lion* on the first amendment purpose of preserving “an uninhibited marketplace of ideas.”<sup>74</sup> However, it is also faulty as a pro-regulation rationale. Implementation of the listeners' rights theory under the initiation requirement contradicts the “uninhibited marketplace” function of the first amendment. The listeners' choices are second-hand ones and will be “inhibited” by the program selections of either the government or the licensee. But the broadcaster's role as a buyer and seller in the marketplace is greatly inhibited when the government determines what it will accept and, in turn, offer to its listeners.<sup>75</sup> Thus, the marketplace itself affords less variety and becomes more of a forum for what the government believes ought to be important to the public.

Of course, recognition of listeners' interests in receiving information need not in all cases constrict the marketplace. Recognition of a “right to receive” information has been used to free speakers from governmental regulation rather than to impose it upon them.<sup>76</sup> The first amendment distinction between using listeners' interests to deny, rather than to grant, a speaker's freedom to set forth his own views is an important one, as Federal Communications Commissioner Glen O. Robinson has eloquently recognized:

[T]he listeners' rights theory makes nonsense out of the First Amendment; in fact, it stands it on its head. The First Amendment may indeed belong to everybody—as the listeners' rights theory suggests—but it cannot truly belong to everybody unless it first belongs to each and every particular somebody. To deny the individual right in the name of the collective right transforms the First Amendment from a guarantee of individual freedom into its very opposite, rule by public clamor.<sup>77</sup>

---

preexisting resources, thus making one man's produced or purchased property a means to another's end and thereby denying the rights of the producer—in this case, property as well as first amendment rights.

74. 395 U.S. 367, 390 (1969) (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

75. One fairness observer states “[T]he very function of a mass communicator is to select from all available communications those which will be communicated.” Pierson, *The Need for Modification of Section 326*, 18 FED. COMM. B.J. 15, 25 (1963). In the full-play area, as well as in the initiation area, the broadcaster's function as a market actor is undercut by governmental intrusion. Full-play enforcement means that the government, rather than the licensee, has decided an issue is sufficiently controversial to require full treatment of all viewpoints after the initial presentation.

76. See, e.g., *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976) and cases cited therein. In *Virginia Board*, plaintiff-consumers' rights to receive drug price information were used as a basis for allowing them to assert “pharmacists” rights to advertise their products.

77. Memorandum Opinion and Order on Reconsideration of the Fairness Report, 58 F.C.C.2d 691, 707, 36 RAD. REG. (P & F) 2d 1021, 1040-41 (1976).

#### 4. *Argument from Governmental Control*

*Red Lion* offered a fourth justification for the regulation of broadcast content when it said that "the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource *which the Government has denied others the right to use.*"<sup>78</sup> The government's original power to grant or deny the privilege to use the airwaves is purportedly justified by the scarcity rationale and thus would initially seem to fall with a recognition of the invalidity of that justification. But a governmental regulation justification for broadcasting regulation can and perhaps should continue to stand for another reason, as long as the government—whatever its rationale—is in the business of choosing who will and who will not be permitted to operate frequencies. Under the current system—licensing on the basis of whose programming will best serve the public interest—the programming of those who have licenses carries the implicit approval of the government. The imprimatur of the government, then, might be extended to decisions based on the race of an idea's proponent if the licensee is given absolute discretion to program on any basis it chooses.

Thus, when the difficulty of gaining access to the broadcast media is caused by the government, an argument for broadcast content regulation can perhaps be made under a scarcity-imprimatur theory. The argument's validity may be limited, however, to the full-play context. First, governmental refusal to require one of its licensees to initiate coverage of a particular issue at most implies a very tenuous governmental approval of any viewpoint on the untreated issue; but refusal to require a licensee to grant reply time to a person or idea that has been attacked yields a stronger inference that the government favors the presented side of the question. Second, the intrusion on the broadcaster's content selection is less in enforcement of the full-play requirement than in enforcement of the initiation requirement. In the full-play area the broadcaster has at least made the initial choice of subject matter, while in the initiation context the entire subject-matter decision—that the issue is sufficiently controversial to warrant coverage—is made by the government.

Even in the full-play context, the scarcity portion of the scarcity-imprimatur theory has a significant drawback. Despite governmental regulation, commercial broadcast facilities today—even commercial FM radio stations alone—are far more plentiful than daily and Sunday newspapers combined.<sup>79</sup> And while the imprimatur portion of the

---

78. 395 U.S. 367, 391 (1969) (emphasis added).

79. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1976 535, 539 (97th edition 1976). There were 2847 commercial FM stations in 1975, and the combined total of daily and Sunday newspapers in 1975 was 1,756. The total number of commercial radio facilities in that year was 7,335.



argument from governmental regulation may have some validity in the full-play context despite the relative lack of scarcity, it does not argue for the retention of the underlying content-oriented licensing and regulatory scheme.<sup>80</sup>

Had the government, early in radio's development, properly recognized, defined, and delimited broadcast frequencies as the product and property of those who created them, the justifications offered for the first amendment distinction between news content selection in the broadcast and print media, and their manifestation in *Mink*, would not be with us. The station owner would have the same kind of first amendment protection against the government as the individual with his own unamplified voice and the editor with his own newspaper; that is, he would have first amendment protection to select and offer what he wanted to present rather than accepting and offering what the government wanted him to present.

Complete governmental rights to the medium would obviate in a different way the fairness doctrine and other public interest regulation. Justice Douglas has hypothesized that if "[a] licensee . . . [were] an arm of the government, [it] would be unable by reason of the First Amendment to 'abridge' some sectors of thought in favor of others,"<sup>81</sup> thereby suggesting that access for all who wished to be heard over the air would be the order of the day, assuming that were possible.

Congress opted for neither of these alternatives, fixing the legal rights to broadcast frequencies in the center of the spectrum between absolute governmental control and the full complement of property rights generally accorded the print media.<sup>82</sup> The absence of exclusive governmental control of the airwaves, according broadcasters greater freedom than common carriers,<sup>83</sup> and the first amendment and statu-

---

80. See note 70 *supra*.

81. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 150 (1973) (Douglas, J., concurring). Justice Douglas also noted that the Court has not accepted his suggestion and concluded therefrom that broadcasters' freedom should be identical to that accorded the print media.

82. The resulting concept of "public ownership" borders on absurdity in the broadcasting context. There is no such entity as the public—the public is only a collection of individuals. To say that the entire public owns radio frequencies by virtue of merely being alive while saying that those who own and operate the facilities do not own the frequencies resulting from such operation, completely ignores that the frequencies exist by virtue of the ability and effort of that small number of individuals who created and maintain those requisite facilities. See note 70 *supra*.

Even if public ownership were a viable concept, it would not point toward the regulation of broadcasting as distinct from any other communications medium. See, e.g., Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967) (if public ownership justifies regulation, all types of speech using airspace should be regulated, including bullhorns and back-fence gossip); Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 GEO. WAS. L. REV. 719 (1963) (if use of public domain allows censorship, no medium has right to be free); Pierson, *The Need For Modification of Section 326*, 18 FED. COMM. B.J. 15 (1963) (ownership irrelevant, though public ownership traditionally requires fewer rather than more restraints.)

83. See 47 U.S.C. § 153(h) (1970).

tory prohibitions against censorship suggest a governmental hands-off attitude toward broadcasters similar to that taken toward the print media. But since the licensees' legal rights in the frequencies created by their facilities are limited, with much control over broadcasting reposed in the government,<sup>84</sup> it should follow that licensees cannot exclude from the air all but their own viewpoints.

These conflicting considerations could only yield a regulatory scheme embodying similar conflicting considerations and render almost impossible the task of defining "censorship" in regard to a medium simultaneously allocated between broadcasters and the public. The fairness doctrine as enforced in *Mink* is an excellent example of that proposition. The government's role was a limited one, determining only whether or not WHAR had acted reasonably and in good faith. Having found that failure to cover a particular issue was unreasonable and not in good faith, the remedy was governmental selection of what the broadcaster would cover—a remedy that would clearly be censorship if the broadcaster's legal right to the frequency created by its facility paralleled the newspaper publisher's legal right to the use of his facilities.

It is beyond the scope of this paper to articulate a complete proposal for the abolition of public interest content regulation in broadcasting. Indeed, such an abolition is unlikely to occur, for the regulatory scheme has been with us for over fifty years and the Court and the Commission are undoubtedly convinced that it maximizes the total benefit from the broadcast media to all concerned.<sup>85</sup> Nonetheless, the degree of governmental intrusion into licensees' freedom to select programming matter evidenced in *Mink* suggests that if the first amendment protects broadcasting, it does so only in fields other than news presentation.<sup>86</sup> This obliteration of the concept of a free

---

84. 47 U.S.C. § 301 reads in part: "It is the purpose of this chapter . . . to maintain control of the United States over all the channels . . . and to provide for the use of such channels, but not the ownership thereof, under licenses . . ."

85. The Supreme Court in *Red Lion*, 395 U.S. 367, evidenced its reluctance to abandon the "inherent scarcity" rationale as a basis for distinction between the print and broadcast media, saying, "It is enough to say that the resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress." *Id.* at 399. The Court also noted that "advances in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace." *Id.* at 396-97. The latter statement is simply an expression of the economic scarcity situation which exists as well in the print media. See notes 68 and 79 *supra*.

86. Two recent developments suggest a desire to at least keep the Commission out of entertainment programming. In *Writer's Guild v. FCC*, 423 F. Supp. 1069, 1143 (C.D. Cal. 1976) the court found that the National Association of Broadcasters "family hour" policy was a result of FCC pressure, and stated that the networks have "a First Amendment and statutory duty to program exclusively on the basis of their independent judgment."

The Commission itself affirmed its intention to stay out of entertainment programming in an inquiry into *Citizens Committee to Save WEFM, Inc. v. FCC*, 506 F.2d 246 (D.C. Cir. 1974). The Commission's report can be found in 45 U.S.L.W. 2114, August 24, 1976. The Commission states, at 2115:

In summary, FCC regulation of entertainment format as an aspect of the public

market of voluntarily exchanged ideas is particularly unjustified in light of the invalidity of its central premise, the scarcity rationale.

#### IV. CONCLUSION

The first amendment attitude of the Supreme Court of the United States toward the print media is that the government has no business determining news program content. In stark contrast, the Court sanctions governmental regulation of program content in the broadcast media. The Federal Communications Commission, charged with simultaneously avoiding censorship and regulating news broadcasting, performs its duties largely through the fairness doctrine.

The Commission's unconsidered decision in *Mink* makes it quite clear that broadcast content regulation and freedom of speech cannot coexist. Freedom of information and thought would have been better served in this ostensibly free society if the *Mink* decision had not extended federal control of broadcast content to selection of news issues to be discussed. If this decision is to have any value at all in our legal structure, it is that it may foster a thorough reconsideration of the Supreme Court's and the Commission's first amendment approach to the broadcast media.

*Robert A. Weible*

---

interest would produce an unnecessary and menacing entanglement in matters that Congress meant to leave to private discretion. Any such regulatory scheme would be flatly inconsistent with congressional policy as manifested in the Communications Act, counterproductive in terms of maximizing the welfare of the radio-listening public, an administrative nightmare, and unconstitutional as impermissibly chilling innovation and experimentation in radio programming."

Unfortunately, neither the Court in *Writer's Guild*, decided five months after *Mink*, nor the Commission, whose inquiry came just two months after *Mink*, reveals the distinction between news and entertainment that erases in the news context the licensee's duty to program exclusively on the basis of his own judgment, or the "menacing entanglement" that regulation of format would produce.

